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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-218

CARBON FUEL COMPANY, *Petitioner,*

v.

CECIL D. ANDRUS, Secretary of the Interior, and UNITED MINE WORKERS OF AMERICA, *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT UNITED MINE WORKERS OF AMERICA

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On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENT UNITED MINE WORKERS OF AMERICA

Respondent United Mine Workers of America (UMWA) hereby answers in opposition to the petition for a writ of certiorari.

QUESTIONS PRESENTED FOR REVIEW

1. Did now-amended-and-superseded § 105 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 815 (1970), not only empower adjudicative bodies to modify abatement periods allowed in warning notices issued under now-amended-and-superseded 30 U.S.C. § 814(b) (1970), but also create a power to review and set aside, on the merits, the more than

100,000 such warnings issued each year by federal coal mine inspectors?

2. Should this Court consider the petitioner's new contention with respect to the alleged unconstitutionality of now-amended-and-superseded 30 U.S.C. § 815 (1970), even though it was not properly presented to and not considered by the Court of Appeals, having not been presented until the petitioner requested a rehearing two weeks after the Court of Appeals rendered its decision?

3. Should this Court attempt to influence the resolution of a conflict of decision between administrative law judges of the new Federal Mine Safety and Health Review Commission as to the scope of new 30 U.S.C.A. § 815(d) (1978 pocket part)—before the just-appointed Commission has considered the conflict, before any Court of Appeals or District Court has been able to review whatever the Commission may decide, and even though the Court of Appeals herein did not render any holding on that question?

STATUTES INVOLVED

Section 104(b) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 814(b) (1970):

> "(b) Except as provided in subsection (i) of this section, if, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard but the violation has not created an imminent danger, he shall issue a notice to the operator or his agent fixing a reasonable time for the abatement of the violation. If upon the expiration of the period of time as originally fixed or subsequently extended, an authorized representative of the Secretary finds that the violation has not been totally abated, and if he also finds that the period of time should not be further extended, he shall find the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that the violation has been abated."

Section 105 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 815 (1970):

> "(a) (1) An operator issued an order pursuant to the provisions of section 814 of this title, or any representative of miners in any mine affected by such order or by any modification or termination of such order, may apply to the Secretary for review of the order within thirty days of receipt thereof or within thirty days of its modification or termination. An operator issued a notice pursuant to section 814(b) or (i) of this title, or any representative of miners in any mine affected by such notice, may, if he believes that the period of time fixed in such notice for the abatement of the violation is unreasonable, apply to the Secretary for review of the notice within thirty days of the receipt thereof. The applicant shall send a copy of such application to the representative of miners in the affected mine, or the operator, as appropriate. Upon receipt of such application, the Secretary shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing, at the request of the operator or the representative of miners in such mine, to enable the operator and the representative of miners in such mine to present information relating to the issuance and continuance of such order or the modification or termi-

nation thereof or to the time fixed in such notice. The filing of an application for review under this subsection shall not operate as a stay of any order or notice.

"(2) The operator and the representative of the miners shall be given written notice of the time and place of the hearing at least five days prior to the hearing. Any such hearing shall be of record and shall be subject to section 554 of Title 5.

"(b) Upon receiving the report of such investigation, the Secretary shall make findings of fact, and he shall issue a written decision, incorporating therein an order vacating, affirming, modifying, or terminating the order, or the modification or termination of such order, or the notice, complained of and incorporate his findings therein.

"(c) In view of the urgent need for prompt decision of matters submitted to the Secretary under this section, all actions which the Secretary takes under this section shall be taken as promptly as practicable, consistent with adequate consideration of the issues involved.

"(d) Pending completion of the investigation required by this section, the applicant may file with the Secretary a written request that the Secretary grant temporary relief (1) from any modification or termination of any order, or (2) from any order issued under section 814 of this title, except an order issued under section 814(a) of this title, together with a detailed statement giving reasons for granting such relief. The Secretary may grant such relief, under such conditions as he may prescribe, if—

(1) a hearing has been held in which all parties were given an opportunity to be heard;

(2) the applicant shows that there is substantial likelihood that the findings of the Secretary will be favorable to the applicant; and

(3) such relief will not adversely affect the health and safety of miners in the coal mine.

No temporary relief shall be granted in the case of a notice issued under section 814(b) or (i) of this title."

STATEMENT OF THE CASE

Petitioner Carbon Fuel Company (Carbon) seeks review of a decision of the United States Court of Appeals for the District of Columbia Circuit (McGowan, Robinson and Wilkey, JJ.), vacating an order entered on behalf of the Secretary of the Interior by his former adjudicative delegate, the now-abolished Interior Board of Mine Operations Appeals. The Interior Board's order affirmed an earlier order of an Interior Department administrative law judge (ALJ), which order had vacated a violation warning notice issued to Carbon by a federal coal mine inspector under § 104(b) of the Federal Coal Mine Health and Safety Act of 1969 (1969 Act), 30 U.S.C. § 814(b) (1970). The ALJ purportedly entered his order under the 1969 Act's § 105, 30 U.S.C. § 815 (1970). The § 814 (b) warning notice had been issued to Carbon during a health inspection requested pursuant to 30 U.S.C. § 813(g) (1970) by respondent United Mine Workers of America (UMWA). As the collective bargaining and safety representative of Carbon's non-supervisory coal mining personnel, the UMWA was a statutory party before the ALJ and the Interior Board, and was the appellant in the Court of Appeals.

Under §§ 103(a) and (g) of the 1969 Act, 30 U.S.C. §§ 813(a) & (g) (1970), Interior Department inspectors meeting expertise requirements set out in that Act's § 505, 30 U.S.C. § 954 (1970), were to make fre-

quent inspections of the nation's coal mines. An inspector who found a condition constituting an "imminent danger" was to order immediate evacuation of the "affected area" of the mine until the danger ceased.[1] 30 U.S.C. § 814(a) (1970). An inspector finding an unsafe or unhealthful condition which both violated a federal safety or health standard and constituted a less than "imminent" danger was to issue a notice, warning that evacuation of the "affected area" would be ordered unless the mine operator abated the cited condition within a fixed "reasonable" period.[2] 30 U.S.C. § 814(b) (1970). Other kinds of warning notices were issued pursuant to 30 U.S.C. § 814(i) (1970), and other kinds of "affected area" evacuation orders under 30 U.S.C. §§ 814(c), (h) & (i) (1970). And, subject to administrative and de novo court review, civil penalties were assessed for all violations found in warning notices and evacuation orders. 30 U.S.C. § 819 (a) (1970); see *NICOA* v. *Kleppe*, 423 U.S. 388 (1976).

Some review of warning notices and evacuation orders was provided in the 1969 Act's §§ 105 and 106, 30 U.S.C. §§ 815 & 816 (1970)—the question presented by this case is how much review was provided. A person aggrieved by an evacuation order could "apply . . . for review of the order" under 30 U.S.C. § 815(a) (1) (1970), and anyone aggrieved by a warning notice could, "if he believe[d] that the period of time fixed in [the] notice for abatement of the violation [was]

[1] An "imminent danger" was defined in 30 U.S.C. § 802(j) (1970).

[2] Interim health and safety standards were set out at 30 U.S.C. §§ 841-46 & 862-78 (1970), while improved standards were to be promulgated following procedures outlined in 30 U.S.C. § 811 (1970).

unreasonable, apply . . . for review of the notice" under the same section. Sections 105(d) and 106(c)(1), 30 U.S.C. §§ 815(d) & 816(c)(1) (1970), allowed temporary *pendente lite* relief from some types of evacuation orders, including 30 U.S.C. § 814(b) (1970) orders issued for failure to abate conditions cited in § 814(b) warning notices. At the same time, those sections prohibited temporary relief from imminent danger evacuation orders, as well as from warning notices themselves. 30 U.S.C. § 815(d) (1970) recognized "the urgent need for prompt decision" of cases submitted under § 815, requiring Interior Department administrative personnel to act in them "as promptly as possible."

The events in this particular action began in February 1975, when a federal mine inspector with 17 years of experience in the coal industry, in collaboration with another with 40 years of experience, issued § 814 (b) violation warnings to Carbon at two of its mines in Kanawha County, West Virginia. Carbon was given a month to abate, being warned that if it failed to eliminate the conditions found by the inspectors to constitute violations within that period, evacuation of the "affected areas" would be ordered.[3] Carbon promptly applied for relief from one of the two notices[4] to the ALJ below, who vacated it on the merits

[3] The inspectors found that conditions at the two mines violated the federal standard set out at 30 C.F.R. § 75.1712-2, which requires coal mine operators to provide "convenient" facilities for bathing and changing clothes for each mine.

[4] Carbon had been cited for providing "inconvenient" bathing facilities eight miles from one mine and three miles from another. It appealed from the warning given at the mine three miles from facilities.

(*Continued on following page*)

following an evidentiary hearing, and who was subsequently affirmed by the Interior Board.[8]

The ALJ's decision was predicated upon his finding that 30 U.S.C. § 815 (1970) not only gave him authority to shorten or lengthen the abatement period allowed in the challenged warning notice, but also authorized him to vacate the notice on the merits. Petition at 31a-32a. Section 815(a) provided, again, that an aggrieved person could, "if he believe[d] that the period of time fixed in [a] notice for abatement of [a] violation [was] unreasonable, apply . . . for review of the notice." The ALJ's theory, based upon *dicta* in an earlier Interior Board decision, was that "any time for abatement is an unreasonable time if no violation exists." *Id.* The

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The inspectors testified that winter temperatures in the area of the latter mine were "sub-zero," that it was "very muddy and wet" in the mine, and that the miners would therefore get muddy and wet from working in it.

To reach bathing facilities and clean clothes from their underground workplaces, the miners would have to get to the surface, then get into and warm up their automobiles, and then drive three miles—two of which were down a rough and narrow dirt road. The drive took seven to fifteen minutes, depending upon the season, the condition of the road, and how fast one drove.

The inspectors added that they would have also cited Carbon for violations at other mines two miles from bathing and changing facilities, but for the fact that the other mines were old and thus close to being abandoned, while the cited mine was less than a year old (opened Spring 1974).

[8] The ALJ in essence found that the inspectors had been impermissibly "arbitrary" because they had not also cited Carbon for violations at its older mines. He also found that the inspectors health-related testimony was inadequate because they had "no data" showing the harmful effects of prolonged exposure to the elements when one is wet, muddy and tired. The Interior Board affirmed on the ALJ's theory that the inspectors had been "arbitrary."

Interior Board did not discuss the scope of § 815 in its affirmance.

On appeal by the UMWA pursuant to 30 U.S.C. § 816 (a) (1970), the Court of Appeals reversed, holding that the ALJ erred in finding that he had the power to vacate the notice. After studying the statutory language and the legislative history, the Court concluded that § 815 merely created authority to modify a warning notice's abatement period. Petition at 7a-15a. The Court therefore had no need to consider the UMWA's challenge to the ALJ's holding on the merits, and did not do so. *Id.* at 7a, n. 24. Nor did it "pass on" the "constitutionality of the statutory scheme," since "no issue ha[d] been raised concerning [it]." *Id.* at 14a, n. 55. Carbon's petition for rehearing, attempting to raise a constitutional objection for the first time, was quickly denied.

In its decision, the Court of Appeals observed that it was "speak[ing] largely to the past" because the applicable provisions of the 1969 Act had been amended and superseded by new legislative provisions "cast in substantially modified language." *Id.* at 2a and at 3a, n.3. The Court was referring to provisions of the new Federal Mine Safety and Health Amendments Act of 1977, Public Law 95-164 (Nov. 9, 1977), 30 U.S.C.A. § 801 *et seq.* (1978 pocket part), which became effective on March 8, 1978. The Court further observed that since the 1977 Act's provisions were expressly made inapplicable to proceedings pending on the date it became effective by 30 U.S.C.A. §§ 961(c)(3-4) (1978 pocket part), the Court had "no call to construe the 1977 Act itself." *Id.* at 3a, n. 3. The Court added that "nothing" in the language or legislative history of the 1977 Act "modifie[d]" its "view of how Congress contemplated

that the 1969 Act would operate on the matter here at issue." *Id.*

REASONS FOR DENYING THE WRIT

Petitioner Carbon Fuel Company asks this Court to review the decision of the Court of Appeals because of the alleged existence of three of the possible grounds for certiorari review enumerated in this Court's Rule 19(1)(b). In the words of the Rule, Carbon alleges that the Court of Appeals "decided an important question of federal law which has not been, but should be, settled by this Court"; "decided a federal question in a way in conflict with applicable decisions of this Court"; and "rendered a decision in conflict with the decision of another court of appeals on the same matter."[*] In reality, however, none of the three enumerated grounds are actually present here. Moreover, the federal law question decided below has now become so unimportant that review should be denied even if this Court finds a decisional conflict.

I. The Federal Law Question Decided Below Is No Longer Important.

Contrary to the petition, the question decided by the Court of Appeals is no longer an important question of federal law. Indeed, Carbon does not even bother try-

[*] Carbon also contends that certiorari review should be granted because the decision below allegedly conflicts with a district court decision, and because it conflicts with an earlier decision of the agency whose order was reversed by the Court of Appeals' decision.

However, this Court does not grant review to resolve decisional conflicts between the courts of appeals and the district courts. Nor, needless to say, does it grant review to resolve "conflicts" between courts and agencies whose decisions they are empowered to review.

ing to allege that the question the Court actually decided—the scope of now-superseded 30 U.S.C. § 815 (1970)—is itself of any importance. Rather, Carbon asks for review because of the alleged importance of another question which the Court of Appeals, in its own words, had "no call" to consider. Petition at 3a, n. 3. Namely the scope of new 30 U.S.C.A. § 815(d) (1978 pocket part).

According to Carbon, the decision of the Court of Appeals contains *dicta* indicating a belief that new § 815(d) did not create any power to vacate warning notices issued under new 30 U.S.C.A. § 814(a) (1978 pocket part). Carbon claims that some of the administrative law judges of the new Federal Mine Safety and Health Review Commission have "followed the Court of Appeals' decision" when dismissing challenges to the merits of such notices. Carbon fears that the decision below "will continue to be used as a basis for limiting review" of such notices.

The short answer to Carbon's theory is that this Court simply does not review *dicta* of any kind. Nor does it review unimportant questions, even where resolution of such questions by this Court might possibly have some impact on lower courts and agencies in their consideration of other, important questions. The possible impact that resolution of one question will have upon the resolution of another different question is always speculative. And there may well be no impact at all, which renders any resolution of the first question a waste of the limited resources of all concerned. Moreover, it is safe to say that in the great majority of situations, important but unripe questions of federal law will be correctly resolved without decisional con-

flict by the nation's excellent lower courts, without any need for guidance from this Court.

This Court's wisdom in limiting its review to important questions is plainly demonstrated by the facts here. Even if this Court were to grant review of this case and decide the scope of old § 815, the lower courts and agencies would not in any way be bound to hold that the scope of new § 815(d) is identical. As the Court of Appeals noted, the relevant statutory language has been "substantially modified." Petition at 3a, n. 3. There is new legislative history as well, as there always will be when a statute has been amended. In short, the possible impact of review on the resolution of questions not presented here is merely speculative.

Moreover, Carbon's theory is based upon a misunderstanding of what the decision of the Court of Appeals says. In reality, the Court expressly refrained from declaring how it would have decided the scope of new § 815(d)—a question neither presented nor briefed—expressly observing that it had "no call" to do so. *Id.* It neither indicated how it would have dealt with new § 815(d)'s language and legislative history, nor how it would have dealt with a due process argument like that advanced for the first time by Carbon here. See Petition at 2a-3a incl. n. 3, and at 14a incl. n. 55. Indeed, the Court expressly declined to indicate how it would have decided the scope of *old* § 815 if a due process argument had been presented. Petition at 14a, n. 55.

Also, Carbon neglects to point out that while some ALJs of the new Commission have in fact dismissed challenges to the merits of warning notices filed under new § 815(d), other Commission ALJs have declined to do so. They have held that they *do* have the power to consider such challenges, notwithstanding the decision

below here. See, *e.g., Iselin Preparation Co.* v. *MSHA,* Commission Docket Nos. PITT 78-343 & 78-344 (1978). No one can be absolutely certain of how the Commission will resolve that conflict, nor of how the various Courts of Appeals will decide any challenges to whatever the Commission may decide. Hence, Carbon's claim that the Court of Appeals' decision will "be used as a basis for limiting review" of warning notices is likewise speculative.

II. There Is No Conflict of Decision.

1. Contrary to Carbon's petition, the decision of the Court of Appeals in no way conflicts with anything this Court decided in *NICOA* v. *Kleppe,* 423 U.S. 388 (1976), where this Court in fact affirmed a decision of the same Circuit—494 F.2d 987 (D.C. Cir. 1974). In *NICOA* this Court only decided whether hearings and formal findings of fact were required in uncontested civil penalty proceedings under now-superseded 30 U.S.C. § 819(a) (1970).[7] See 423 U.S. at 690, 693. In contrast, the Court below only decided whether now-superseded 30 U.S.C. § 815 (1970) created adjudicative power to vacate warning notices issued under now-superseded 30 U.S.C. § 814(b) (1970). In short, the Court of Appeals only decided the scope of § 815, while this Court in *NICOA* only decided the scope of § 819 (a)—an entirely unrelated question.[8]

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[7] The successor provisions to old § 819(a) are set out at 30 U.S.C.A. §§ 815(a), 816(a-b), 820(a, i-k) & 821(d) (1978 pocket part).

[8] If anything, the decision below is in complete accord with the spirit of *NICOA*. There this Court followed Congressional intent to do away with "complex procedural provisions relating to inspections, appeals, and the postponing of orders," which had previously made it "exceedingly difficult" to "carry out an effective enforcement program" in the mine safety area. 423 U.S. at 399.

Carbon's argument to the contrary is based upon language in *NICOA* where this Court was accurately describing how the Interior Department was interpreting § 815 at the time *NICOA* was decided. The description was part of this Court's general introductory description of how the 1969 Act was then operating. However, this Court had no occasion to rule upon the correctness of how the Act was generally operating, or upon how the Department interpreted § 815, and it clearly did not do so. No question concerning § 815 was presented in *NICOA*; *NICOA* did not decide the scope of any provision of the 1969 Act other than 30 U.S.C. § 819(a) (1970).

2. Similarly, the decision of the Court of Appeals does not conflict with anything decided in *Kanawha Coal Co.* v. *Andrus,* 553 F.2d 361 (4th Cir. 1976), or in *Lucas Coal Co.* v. *IBMA,* 522 F.2d 581 (3d Cir. 1975). Like this Court, the Third and Fourth Circuits have not had occasion to decide whether § 815 created adjudicative power to vacate warning notices on their merits. Nor have they done so.

In *Kanawha,* for example, the Fourth Circuit actually affirmed an Interior Board decision dismissing part of a mine operator's § 815 administrative complaint on procedural grounds. The dismissed portion of the complaint did not challenge anything done at the time a federal inspector issued the warning notice at issue, instead asking that the notice be terminated because the cited conditions had allegedly been abated *after* the notice was issued. The operator was afraid that an inspector might come to its mine at the end of the abatement period, might then conclude that the violative conditions had not been abated, and might thereupon issue an evacuation order.

In other words, the operator in *Kanawha* was not asking for "review" of anything already done by the agency, but rather for purely anticipatory relief. And the Fourth Circuit merely decided that § 815 *did not* create adjudicative power to terminate warning notices because of events occurring subsequent to their issuance.

3. Like the Fourth Circuit in *Kanawha,* the Third Circuit in *Lucas* actually affirmed an Interior Board decision dismissing a mine operator's challenge to § 814(b) activity. Thus, like this Court and the Fourth Circuit, the Third Circuit has never approved any exercise of the alleged § 815 power to vacate § 814(b) violation notices.

One part of *Lucas* involved challenges to the merits of several warning notices which had already been terminated due to abatement of the cited conditions. The Third Circuit affirmed the Interior Board's dismissal of that part of the affected operator's complaint as moot, thereby deciding that § 815 *did not* create adjudicative power to vacate warning notices already terminated by federal mine inspectors.

The other part of *Lucas* dealt with the operator's attack on the merits of several § 814(b) notices which were still in effect. The Interior Board denied those challenges on the merits, and the Third Circuit affirmed *without* deciding, or even considering, whether the notices could have been vacated if the Board's decision on the merits had been different. Not surprisingly, that question was not raised by either of the two parties before the Court in *Lucas*—neither by the Board itself, nor by the mine operator, who wanted

notices set aside. All the Third Circuit thus decided in the second part of *Lucas* was that the cited violations had in fact occurred.

III. The Petitioner's Primary Contention on the Merits Was Not Timely Presented to the Court of Appeals, and Therefore Was Never Considered Below.

On the merits, Carbon's chief argument appears to be that the scope of 30 U.S.C. § 815 (1970) must be widened by judicial action in order to preserve its constitutionality under the Due Process Clause of the Fifth Amendment. However, Carbon cannot properly present its due process argument to this Court, since it was not timely presented to the Court of Appeals, and the Court of Appeals therefore never considered it. In its decision, the Court of Appeals specifically noted that "no issue ha[d] been raised [before it] concerning the constitutionality of the statutory scheme," so that Court "d[id] not pass on it." Petition at 14a, n. 55. Carbon did not attempt to make any sort of constitutional argument until it filed a petition for rehearing two weeks after the Court of Appeals handed down its decision.

It is well established that this Court does not grant review to consider contentions not properly raised in the lower Courts. *Electrical Workers Local 790* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 235 n. 7 (1976); *Neely* v. *Martin K. Ely Construction Co.*, 386 U.S. 317, 330 (1967); *California* v. *Taylor*, 353 U.S. 553, 556-557 n. 2 (1957). This Court only grants review to consider matters which lower courts have "decided." By definition, this Court cannot "review" any contention not previously subject to "view" elsewhere.

IV. The Decision of the Court of Appeals Is Correct.

1. Review should also be denied because the decision of the Court of Appeals is clearly correct. The Court carefully considered all of the language and all of the legislative history of 30 U.S.C. § 815 (1970)—something the Interior Board never did (see Petition at 11a-12a)—and reached the only conclusion possible after such an analysis. The Court's decision speaks for itself, and needs no further explication.

To be sure, Carbon tries to argue that the Court's decision is contrary to § 815's plain words. But Carbon can do so only by giving disingenuous meanings to some "words," and by failing to quote others which contradict its position. Furthermore, Carbon does not even address a legislative history which the Court of Appeals found to be "unambiguous," "strong," "straightforward," and directly contrary to what Carbon proposes argument.

2. Carbon's simplistic due process argument is likewise wrong. Carbon contends that the Fifth Amendment always requires an adjudicative hearing before anyone can be deprived of any kind of property interest. Accordingly, Carbon argues that § 815 was unconstitutional as enacted because, without prior hearings before administrative law judges on the merits, it allowed federal mine inspectors to order evacuation of areas of mines affected by conditions found to constitute violations of health and safety standards.

In reality, however, the Due Process Clause does not always require advance hearings prior to infringements of property interests. Rather, as numerous decisions of this Court indicate, it merely requires some kind of a hearing at a meaningful time and in a meaningful

manner. The 1969 Act gave extensive procedural protection to recipients of warning notices issued under 30 U.S.C. § 814(b) (1970). That protection went far beyond meeting minimum due process requirements, as clearly indicated by a comparison of the procedures here with those approved of in such recent decisions as *Mathews* v. *Eldridge,* 424 U.S. 319 (1976), *Goss* v. *Lopez,* 419 U.S. 565 (1975), and *Mitchell* v. *W.T. Grant Co.,* 416 U.S. 600 (1974).[9]

Under the 1969 Act, a mine operator who received one of the more than 100,000 warning notices issued each year was thereby given complete and timely advance notice of a possible future evacuation order. The 1969 Act required all notices to describe the cited conditions in detail, so that the operators would know exactly what they had to abate. 30 U.S.C. § 814(e) (1970). The notices were to allow "reasonable" abatement periods, and the periods set were reviewable in proceedings before administrative law judges. 30 U.S.C. §§ 814 (b) & 815(a) (1970).

By its own terms, warning notices and evacuation orders issued pursuant to § 814(b) could only be issued by neutral federal mine inspectors in the public service, and not by interested private parties. Notices and orders could only be based upon conditions personally observed by the inspectors during the exercise of their duties, § 814(b), and the inspectors had to possess the expertise required by 30 U.S.C. § 954 (1970). In lieu of

[9] As the Court of Appeals observed, Carbon's proposed alternative to the statutory system would have required miners to continue their labors under conditions "believed to be unwholesome and in contravention of the Act's health and safety standards." Petition at 14a.

issuing evacuation orders when abatement deadlines were not met, the inspectors could grant additional abatement time where warranted. § 814(b).

Once a § 814(b) evacuation order had been issued, the affected operator had an immediate right to file for a full hearing on the merits before an administrative law judge. 30 U.S.C. § 815(a) (1970). Such hearings were to be held "as promptly as practicable," and temporary pendente lite relief was available. 30 U.S.C. §§ 815(c-d) (1970).

The evacuation orders were limited in scope and duration. They only covered the "affected areas" of the operators' mines, and they only remained in effect until the cited conditions were abated. § 814(b). The mines remained in the possession of the operators at all times, as did their coal, and the coal was still there to be mined once abatement was achieved. Nothing was removed, nothing was destroyed,[10] and no one was deprived of any of the necessities of human life.

[10] Compare *Miles* v. *District of Columbia,* 510 F.2d 188 (D.C. Cir. 1975), cited by Carbon at page 13 of the petition, where property was actually going to be destroyed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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